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Borgers, M.J.; Stevens, L.

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M.J. Borgers & L. Stevens

1. The General Theory of Admissibility and Exclusion of Illegally Gathered Evidence

1.1. Some Starting Points of the Evidentiary System of Criminal Procedure

This report gives an overview of the way in which the Dutch law of criminal procedure deals with illegally gathered evidence, in particular when the suspect's right to privacy or right to voluntary statement is violated.[1] For a proper understanding of this element of the Dutch law of criminal procedure, it is important to outline several starting points of Dutch evidentiary law in criminal cases.

- The evidentiary system in criminal cases is based on the principle of establishing the substantive truth. This is expressed in the Dutch Code of Criminal Procedure (CCP) (*Nederlandse Wetboek van Strafvordering (Sv)*) in the requirement that a judge may assume that the offense charged is proven only if he 'is convinced of it'.[2] This means that a high degree of certainty must exist that the accused has committed the offense.
- The judge must be convinced by the contents of legal evidence. This is the evidence that the Code of Criminal Procedure considers admissible in criminal proceedings. It concerns: the judge's own perception, statements by the accused, statements by a witness, statements by an expert and written documents (Section 339 CCP). This summary is so broad that hardly any evidence can be indicated that the law does not consider admissible.[3]
- The statutory provisions on admissible evidence contain a few so-called minimum evidence rules. These minimum evidence rules limit the free establishment of the truth by the judge for the purpose of facilitating establishment of the substantive truth.[4] An example of a minimum evidence rule is the rule that proof that the accused has

1 For literature on this subject, see: Embregts 2003; Embregts 2004, notes on Section 359a; Van Woensel 2004, p. 119-171; Nijboer 2008, p. 138-156; Corstens 2008, p. 703-715; Kuiper 2009, p. 35-59.
2 There is no constitutional provision with the same purport.
3 An example of such an exception is what the lawyer puts forward during the hearing.
4 De Wilde 2008, p. 269-294.

committed the offense charged must not be assumed (in principle)[5] only on the basis of a statement by one witness or by the accused. Because there is always a chance that the witness or the accused will not tell the truth, the law requires a second statement to be used as evidence in these cases. In the judicial system, minimum evidence rules tend to have minimum explanations as well.

- Apart from the aforementioned minimum evidence rules, the provisions on admissible evidence do not contain any rules on the reliability of the evidence or how it is gathered. Consequently, unreliable or illegally gathered evidence is admissible in itself as legal evidence. Evidence can, however, be excluded: evidence admissible in itself may be set aside because of its unreliability or the way it was gathered. In such a case, the judge does not use that evidence as a basis for his opinion on whether the offence charged was committed.
- The above-mentioned reasons for excluding evidence – unreliability and illegal gathering – should be distinguished. If evidence is unreliable, its exclusion is based directly on pursuit of the substantive truth. The exclusion of illegally gathered evidence has a separate legal basis: Section 359a CCP. Gathering evidence illegally does not automatically result in exclusion of the evidence. As discussed in more detail below, other sanctions are also possible. In some cases, evidence is unreliable because certain legal rules on gathering evidence have been violated. In that case, in which unreliability coincides with illegal gathering of the evidence, the evidence is already excluded on the basis of unreliability. In principle, the rule of Section 359a CCP need not be applied.[6]

1.2. Sanctions on Illegal gathering of Evidence

1.2.1. The Legal Framework

The Dutch Code of Criminal Procedure gives rules in Section 359a on the assessment of the illegal gathering of evidence. The text of Section 359a CCP reads as follows:

> 1. If procedural rules prove to have been breached during the preliminary investigation, which breach can no longer be remedied, and the legal consequences of the breach are not apparent from statutory law, the court may rule that:
>
> a. the severity of the punishment will be decreased in proportion to the gravity of the breach if the harm caused by the breach can be compensated in this way;
>
> b. the results of the investigation obtained through the breach may not contribute to the evidence of the offense charged;
>
> c. the Public Prosecution Service will be barred from prosecuting if the breach makes it impossible to hear the case in compliance with the principles of due process.
>
> 2. In applying the first subsection, the court must take account of the interest that the breached rule serves, the gravity of the breach and the harm it causes.
> 3. The judgment must contain the decisions referred to in the first subsection. These must be reasoned.

[5] An important exception is contained in the rule that evidence that the accused has committed the offence charged *can* – not *must* – be assumed by the judge on the basis of an official report by an investigating officer. See Section 344(2) CCP.

[6] For a detailed explanation of the distinction between unreliable and illegally gathered evidence, see Dubelaar 2009, p. 93-105.

Before discussing the way in which the rule in Section 359a CCP has developed in the case law of the Dutch Supreme Court (Hoge Raad), two parts of this provision require further attention for the purpose of a comparison with other legal systems.

The first subsection of Section 359a CCP refers to the court. By court, the Act means the judicial authority that handles the substance of the case. In all cases, this is a professional court. Lay justice does not exist in the Netherlands. The judge who rules on the attachment of consequences to illegal gathering of evidence also rules on the indictment of the accused. Owing to this, the situation can occur that the judge takes cognizance of the contents of an article of evidence and then decides that this evidence must be excluded because it was gathered illegally. The consequence is that the judge, even though he has knowledge of the contents of the evidence, may not use those contents as a basis for his opinion on whether the offense charged has been proven. This has not gone without criticism: there is a risk that the judge – consciously or unconsciously – will nevertheless be guided by the contents of the excluded evidence. Nevertheless, that criticism did not result in the introduction of separate proceedings in which a judge other than the judge hearing the case (exclusively) decides whether or not to remove the evidence from the file because it was gathered illegally. In the Dutch law of criminal procedure, there is trust that the (professional) judge will ignore the contents of the excluded evidence in forming his or her opinion.

The first subsection of Section 359a CCP also mentions the breach of procedural rules in the preliminary investigation. This means failure to observe written and unwritten rules that apply to gathering evidence. No distinction is made between the different types of rules. They can be rules on respecting fundamental rights, such as the right to remain silent. But they can also be rules that pertain 'only' to the contents of certain documents that have to be shown to the suspect when means of coercion are used. Section 359a CCP is intended to be a provision that applies to all these rules. No distinction is made either between violations of constitutional and non-constitutional rights. The reason for this is partly that the Dutch Constitution only regulates the manner of gathering evidence to a limited extent. Such regulation ensues rather from 'ordinary' legislation and also from the European Convention for the Protection of Human Rights (ECHR). Violations of the ECHR that take place in the context of gathering evidence also count as breaches of procedural rules within the meaning of Section 359a CCP.

1.2.2. Further Development in the Case Law of the Dutch Supreme Court

Section 359a was introduced in the Code of Criminal Procedure in 1996. To a great extent, it codified the applicable case law up to then on illegal gathering of evidence. After 1996, the rule of Section 359a CCP was again developed further in the case law of the Dutch Supreme Court. A very important judgment is that of March 30, 2004, in which the Dutch Supreme Court gave a summary of the case law passed up to then on Section 359a CCP.[7] The lines the Dutch Supreme Court set out in this judgment can still be considered a representation of the prevailing law. The standard judgment of March 30, 2004 is discussed point-by-point below and explained in more detail where necessary.

[7] *Dutch Law Reports* (*Nederlandse Jurisprudentie*) 2004, 376 annotated by Buruma.

1.2.2.1. General Starting Points

Based on the text of Section 359a CCP and its explanation by the legislature, the Supreme Court formulated some general starting points for the application of Section 359a CCP. These include first of all two preconditions that have to be met:

- Section 359a CCP pertains only to breaches of procedural rules committed during the preliminary investigation, in so far as that preliminary investigation relates to the offense with which the accused is charged and thus on which the judge has to decide.[8] This means that no legal consequences are attached to breaches of procedural rules committed in the context of an investigation aimed at someone other than the accused. An example: in the investigation of accused A, in conflict with the rules, a telephone tap is placed. During the monitoring of the calls, incriminating material is collected on B. This material can be used in the criminal case against B, because the breach of procedural rules did not take place in the context of the investigation relating to the offense with which B is charged.[9]
- Furthermore, Section 359a CCP only applies to *irremediable* breaches of procedural rules. If the breach has been or can still be remedied, there is no reason to attach a legal consequence to it. An example is failure to inform the accused of the results of a DNA test, through which the accused is not given the opportunity to request a second opinion.[10] The session judge then needs to examine whether it is still possible to obtain a second opinion. If that is the case, the accused must still be given the opportunity to obtain it. This, of course, has to be a remediable breach of procedural rules. If a search of a home has been conducted without the required authorization, no remedy is possible. Such authorization must be granted prior to the search.

The Supreme Court stated further that in deciding whether a legal consequence will be attached to a breach of procedural rules, and if so, what consequence, the judge must take account of the points of view formulated in the second subsection of Section 359a CCP: i. the interest that the breached rule serves, ii. the gravity of the breach, and iii. the harm caused by the breach. These points of view deserve some further explanation.

- *The interest that the breached rule serves.* Here, the law refers to the so-called relativity requirement by a German term sometimes called the *Schutznorm*. One must see what interest the breached rule is intended to protect, and to what extent this interest relates to the accused. The rules relating to searches of homes are intended to protect the (privacy) interests of the occupant. So only the interests of the occupant are harmed if these rules are breached. An example is a situation in which someone uses a room in a house only as a storage place (for drugs), while not being an occupant of that house. In such a case, no consequences need be attached to a breach of the rules on searches of homes.[11] Apart from that, the Supreme Court leaves some room to attach a sanction nevertheless to the illegal gathering of evidence in cases in which the relativity requirement is not met. This gives the judge a certain margin in responding to breaches of procedural rules that do not

8 In principle, breaches of procedural rules relating to custodial means of coercion, which the accused could have put before the examining magistrate (the judge in the preliminary investigation) at an earlier stage, are not assessed again by the session judge on the basis of Section 359a CCP.

9 HR (Supreme Court) 18 October 1988, *Dutch Law Reports (NJ)* 1989, 306.

10 Cf. HR 3 June 2001, *Dutch Law Reports* 2001, 536.

11 Cf. HR 26 March 2002, *Dutch Law Reports* 2002, 343.

harm the accused's interests, but regarding which he nevertheless considers it inappropriate not to respond. These are, however, exceptional situations.[12]

- *The gravity of the breach*. This point of view is especially important for the choice of the sanction. In the event of very grave breaches of procedural rules, the most severe sanction – barring the Public Prosecution Service from prosecuting – is likely, while the most minor breaches are settled by some reduction of the sentence or by the mere determination of illegality. Under certain circumstances, the good faith of the investigating officers who caused the breach of procedural rules can play a part. For example: an investigating officer enters premises which he presumes to be vacant. After he enters, the premises prove to be occupied. In that case, the absence of the written authorization required to enter the premises does not have to result in exclusion of the evidence if the judge is of the opinion that this investigating officer could and was entitled to assume that the premises were unoccupied.[13]
- *The harm caused by the breach*. If a rule is breached that was written in the interest of a suspect, this is as a rule harmful to the suspect. Under certain circumstances, however, no harm is done. An example is not informing a suspect his right to remain silent. This is in itself harmful to the suspect, unless the suspect is a lawyer. The suspect then knows, after all, without being told, that he has the right to remain silent.

The Supreme Court finally held that not every breach of procedural rules necessarily results in one of the legal consequences referred Section 359a (1) CCP. Section 359a CCP formulates a power, not an obligation. The rationale of Section 359a CCP is not that a breach of procedural rules has to result in some advantage for the accused, no matter what. The point is rather to see whether attaching a sanction to a breach of procedural rules is called for in light of the aforementioned points of view. It is possible, therefore, for a judge to find that procedural rules have been breached without attaching a legal consequence to the breach.

If the judge is of the opinion that a legal consequence should be attached to a breach of procedural rules, the judge will have a choice of the sanctions referred to in Section 359a (1) CCP: barring the Public Prosecution Service from prosecuting, excluding evidence and sentence reduction. The Supreme Court formulates the conditions to be met for each of these sanctions before the relevant sanction can be imposed.

1.2.2.2. Barring Prosecution

The Supreme Court has repeatedly ruled that barring prosecution is an option only in exceptional cases. There is room for this sanction only if investigating officers or the Public Prosecution Service has seriously breached principles of due process, through which, either on purpose or with gross disregard for the interests of the accused, his right to a fair trial has been breached to a considerable extent.[14] To date, this sanction has been imposed mainly in cases where the possibilities of judicial monitoring of the gathering of evidence were deliberately thwarted.[15] Another instance is when an unacceptable agreement is made with a

12 See for example HR 12 January 1999, *Dutch Law Reports* 1999, 290, in which evidence is excluded because a telephone call between a co-suspect and his lawyer was tapped. Tapping calls with professionals entitled to privilege constitutes a serious breach of procedural rules.

13 Cf. HR 19 June 2001, *Dutch Law Reports* 2001, 574, annotated by Reijntjes.

14 See in particular HR 19 December 1995, *Dutch Law Reports* 1996, 249 annotated by Schalken.

15 HR 4 February 1997, *Dutch Law Reports* 1997, 308, annotated by Schalken and HR 8 September 1998, *Dutch Law Reports* 1998, 879, annotated by Schalken.

witness for the prosecution that, in exchange for acting as such, any prison sentence to be imposed will not be enforced.[16]

1.2.2.3. Exclusion of Evidence

According to the Supreme Court, exclusion of evidence can be up for discussion only if the evidence was obtained through the breach, and is considered when a rule or legal principle (of criminal procedure) has been seriously breached by the illegal gathering of evidence. The Supreme Court thus actually sets two requirements. Firstly, a (sufficient) causal connection must exist between the breach of procedural rules and gathering of the evidence. Secondly, an important rule or legal principle must have been breached to a considerable extent.

It is not usually problematic to determine a causal connection between a breach of procedural rules and evidence. If, for example, a search of premises was not conducted in accordance with the applicable rules, evidence gathered during the search may be considered illegal. Nevertheless, it is a fact that relatively high requirements are set in the case law on the requisite causal connection. For instance, a temporal connection is not necessarily a causal connection. If, for example, a statement is made during unlawful detention, that statement will not necessarily count as a result of the unlawful detention.[17] The causal connection can also be broken. An example of this is the situation in which a suspect is unlawfully arrested, while subsequently, when asked, the suspect gives permission for a search of his home. Giving such permission breaks, as it were, the causal connection between the arrest and the search.[18]

The Supreme Court does not explain when a rule is important and under what conditions such a rule is breached to a considerable extent. In a certain sense, the Supreme Court refers to the viewpoints provided by Section 359a (2) CCP.[19] After all, a rule that is not intended to protect (essential) interests of the suspect could generally be considered an unimportant or less important rule. The element of a breach 'to a considerable extent' indicates that there must have been a relatively serious breach and that harm has demonstrably been suffered as well. Exclusion of evidence will generally follow, for instance from a breach of rules pertaining to the suspect's right to voluntary statement.[20] This also holds if an illegal body search is conducted during which drugs are found in a natural cavity of the suspect's body.[21]

More generally speaking, the Supreme Court lets it be known that exclusion of evidence is a sanction that should be used with restraint. The Supreme Court emphasizes, for example, that exclusion of evidence is a power, not an obligation, of the court. The Supreme Court points out further that account must be taken not only of the points of view referred to in Section 359a (2) CCP, but also of the circumstances of the case. This leaves room to make allowance for the gravity of the offense, in the sense that evidence is less likely to be excluded if the offense is serious than if the offense is minor.

16 HR 1 June 1999, *Dutch Law Reports* 1999, 567, annotated by Schalken and HR 8 June 1999, *Dutch Law Reports* 1999, 773, annotated by Reijntjes.
17 See for example HR 19 January 1999, *Dutch Law Reports* 1999, 251.
18 Cf. HR 8 February 2000, *Dutch Law Reports* 2000, 316.
19 Cf. Embregts 2004, Note 10.11 to Section 359a.
20 See Part III.
21 HR 29 May 2007, *Dutch Law Reports* 2008, 14, annotated by Reijntjes.

1.2.2.4. Sentence Reduction

The Supreme Court formulates four conditions for the use of sentence reduction as a sanction on a breach of procedural rules: a. the suspect has actually been harmed, b. the harm was due to the breach, c. the harm is suitable for compensation by sentence reduction, and d. sentence reduction is justified in light of the importance of the breached rule and the gravity of the breach. The first and last requirements reflect the viewpoints referred to in Section 359a (2) CCP, while the second requirement pertains to the requisite causal connection. It is especially interesting to pay attention to the third requirement: the harm is suitable for compensation by reducing the sentence. It is important that 'compensation' is concerned. Where exclusion of evidence can be considered to have *remedied* the illegal gathering of evidence, sentence reduction does not go as far. Nothing is remedied, but something is given in return for the breach. For that reason, sentence reduction is mainly an appropriate sanction for less serious breaches of procedural rules. Examples are a search during which the main, but not all legal requirements are met,[22] or systematic surveillance of a home from the public road without permission from the public prosecutor.[23] In addition, sentence reduction is also a sanction that can be imposed if unlawful actions do not result in evidence and evidence cannot be excluded for that reason. If such unlawful actions are not so serious that they must be followed by barring prosecution, sentence reduction is an appropriate sanction. An example is an arrest lawful in itself that is accompanied by unnecessary force.[24]

1.2.2.5. Fruit of the Poisonous Tree

The Supreme Court does not pay specific attention to the doctrine of fruit of the poisonous tree, i.e. indirect obtaining of evidence. The reason is that, on closer analysis, the causality issue proves to be involved, which is already contained in the conditions set on application of the above-mentioned sanctions. There must be a *direct connection* each time between the breach of procedural rules and the deliberate or grossly negligent failure to consider the accused's interests in his right to fair treatment on the one hand and, on the other, the obtaining of evidence or the harm actually suffered by the accused.[25] In the discussion of the exclusion of evidence, it was already noted that a temporal connection does not suffice and that a causal connection can also be broken. This means that fruit of the poisonous tree will not easily be involved.[26] Example: a man was arrested, and asked whether he had burglar's tools on him. The man threw his bag and jacket on the ground and yelled: 'See for yourself!' Burglar's tools were then found in the bag and jacket. It was argued in the criminal proceeding that the man had been arrested unlawfully (because there was no suspicion) and that finding the burglar's tools had to be considered fruit of the poisonous tree of that arrest. The Supreme Court held that, insofar as the arrest should have to be considered unlawful, it cannot be said that this evidence was the direct result of the arrest.[27] The discovery of

22 Cf. HR 2 July 2002, *Dutch Law Reports* 2002, 624.

23 HR 21 March 2000, *LJN* AA5254.

24 Cf. HR 21 December 2004, *Dutch Law Reports* 2005, 172, annotated by Reijntjes.

25 Such a direct connection means that the fruit of the poisonous tree must *exclusively* be the result of the unlawful actions. It is not sufficient (any more) that the fruit of the poisonous tree is *largely* the result of those actions. The recent case law of the Supreme Court is at any rate interpreted in this way.

26 Other possible reasons not to assume a causal connection can be based on alternative causality (evidence arising from an unlawful act, but at the same time also from an independent source) or due to the 'inevitable discovery exception' (the evidence could most likely have been gathered legally as well). These reasons are put forth relatively rarely in the case law. See Embregts 2004, Note 5.10 to Section 359a.

27 Cf. HR 24 February 2004, *Dutch Law Reports* 2004, 226.

burglar's tools was primarily the result of throwing the jacket and bag on the ground and yelling 'See for yourself!' The fact that he did so after the arrest did not affect this.

Examples can also be found in the case law in which fruit of the poisonous tree is indeed excluded from the evidence. An example is a case where, in conflict with the applicable rules, a telephone conversation between the accused and a doctor was tapped. At the hearing, the accused was confronted with that tap report. The Supreme Court held that the way in which the accused reacted to confrontation with the tap report could not be used as evidence.[28] The reaction could be considered a direct result of the breach of procedural rules.

2. Violations of the Right to Privacy

2.1. The Right to Privacy in Dutch Law

Section 10(1) of the Dutch Constitution provides that everyone has a right to respect of his privacy, barring restrictions to be set by or pursuant to the law. This gives the right to privacy the status of a constitutional right. In addition, the right to privacy is guaranteed by Article 8 of the ECHR. This convention provision has direct effect in Dutch law. This is very important, because the Dutch courts are not at liberty to test laws against the Constitution. Testing against the ECHR is, however, allowed.

In addition to the right to privacy, the Dutch Constitution also protects the right to inviolability of the home. Under Section 12(1) of the Constitution, entering a home without permission is allowed only in the cases specified by or pursuant to the law, by those designated to do so by or pursuant to the law. Section 12 Constitution prescribes further that prior identification and notification of the purpose of the entry are required. Moreover, a written report of the entry must be provided to the occupant as soon as possible. The right of inviolability of the home can be construed as a right partly for the purpose of protecting privacy. Protection of the inviolability of the home enables people to enjoy their privacy in their own homes as far as possible without interruption.

2.2. Violation of Privacy in the Context of a Criminal Investigation

The exercise of various powers of criminal procedure violates privacy. One can particularly think of searches of homes and telecommunication taps. The violation of privacy is justified by the existence of specific statutory provisions setting the conditions under which the powers in question may be exercised. Those conditions are for the purpose of ensuring that privacy is not needlessly violated. The law defines the offenses with respect to which the relevant powers may be used, while providing for judicial review of the need to use these powers.[29] In principle, as long as the statutory conditions are observed, there is no question of illegally gathered evidence. Disregarding these conditions constitutes a breach of procedural rules. Sanctions are imposed on such a breach under the provisions of Section 359a CCP. To that extent, breaches of procedural rules that constitute an unacceptable violation of the right to privacy are not treated differently than other breaches of procedural rules. For that reason, this section suffices with a few comments on the Dutch provisions on searches of homes and telecommunication taps.

[28] HR 2 October 2007, *Dutch Law Reports* 2008, 374, annotated by Legemaate.
[29] See Corstens 2008, p. 441-455, p. 475-502.

2.3. Searches of Homes

The Code of Criminal Procedure contains comprehensive rules on searches of homes. The central point is that the search must be conducted as far as possible by the examining magistrate.[30] The (acting) public prosecutor conducts the search only if it is not possible to wait for the examining magistrate to arrive. In that case, authorization from the examining magistrate is required. Such authorization can be obtained by telephone if necessary. The fact that the examining magistrate plays an important part here is connected with the rights to privacy and inviolability of the home. If a home is searched without authorization from the examining magistrate, an important rule of criminal procedure will have been breached. As a rule, this is followed by exclusion of evidence.

Besides the rules in the Code of Criminal Procedure, the Act on Entry into Dwellings (*Algemene Wet op het Binnentreden*) is also important. The latter Act can be considered an elaboration of Section 12 Constitution, in which the right to inviolability of the home is laid down. The General Act on Entry into Dwellings is especially important to the situation in which investigating officers enter a home without searching it. Investigating officers are authorized to do so if an offender is caught in the act or in case a more serious offense is suspected. The purpose of the entry is to seize objects that can be found without a search. If necessary, the situation on site can be frozen with a view to the arrival of the examining magistrate to conduct a search. The General Act on Entry into Dwellings provides for this situation (among other situations) in a series of rules, such as the obligation to identify oneself and an obligation to report. Especially important is that this Act also sets the requirement that on entering a home without the occupant's permission, investigating officers must have a written authorization from the public prosecutor or acting public prosecutor. The General Act on Entry into Dwellings entails rather a lot of paperwork for those involved in the practice. Because of this, things sometimes go wrong in filling out the required forms. Although this constitutes a breach of procedural rules, consequences need not always be attached by far in light of Section 359a CCP. For instance, the Supreme Court ruled that the lack of a signature on an authorization form did not result in exclusion of evidence, because it was plausible that such authorization had also been given orally.[31]

2.4. Tapping Telecommunications

As well as on searches of homes, the Code of Criminal Procedure also contains detailed rules on tapping telecommunications (including telephone taps).[32] Telecommunications are tapped by order of the public prosecutor. Before this order is given, the public prosecutor has to demand an authorization from the examining magistrate. The examining magistrate will issue such an authorization only if the relevant statutory conditions are met. Tapping is allowed only in the event of i. a suspicion of an offense that constitutes a serious breach of the legal order, ii. a suspicion that an organization is plotting or committing serious crimes or iii. indications of a terrorist crime. The investigation must also urgently demand that telecommunications be tapped. This means that no other, less radical means of investigation can be used to establish the truth. Within this framework, the examining magistrate is the most important authority. Without the periodic authorization of the examining magistrate, the tapping of telecommunications is not allowed. Here, too, the lack of an authorization will in principle result in exclusion of evidence.

30 Sections 97 and 110 CCP.
31 HR 16 June 2009, *Dutch Law Reports* 2009, 294.
32 Sections 126la-126nb, 126t-126ub and 126zg-zja CCP.

It is also worthy of note that the session judge is authorized to exercise the power to tap telecommunications. In doing so, the session judge checks whether 'the examining magistrate could reasonably have formed his opinion on the authorization', while also judging 'whether the subsequent use by the public prosecutor of his authority to order the tapping of telecommunications by technical means is in accordance with that authorization and lawful as well'.[33]

3. Illegal Interrogations

3.1. Section 29 Code of Criminal Procedure: the Right to remain silent and the Right to Voluntary Statement

The suspect's right to voluntary statement and right to remain silent are laid down in Section 29 CCP. Subsections 1 and 2 of that section read:

> [1] In all cases in which someone is interrogated as a suspect, the interrogating judge or official must refrain from doing anything for the purpose of obtaining a statement that cannot to be said to have been made freely. The suspect is not required to answer.
> [2] Prior to the interrogation, the suspect must be told that he is not required to answer.

The right to voluntary statement contained in subsection 1 of Section 29 CCP (the phrase '(…) that cannot be said to have been made freely') and the right to remain silent ('the suspect is not required to answer') are considered the core values that give shape to the position of the suspect in criminal proceeding.[34] A right to remain silent is effective only if the suspect is aware of it. For that reason, the subsection 2 of Section 29 CCP contains the obligation for the interrogating official to inform the suspect of his right to remain silent, the so-called caution (reading the suspect his rights).

Much more than the right to privacy, the suspect's right to remain silent has been the subject of debate within Dutch criminal procedure. Because of the importance of the right to remain silent and some interesting recent developments, the suspect's right to remain silent and the application of Section 359a CCP to violation of the right to remain silent will be discussed in detail below.

3.2. The Principles on which Section 29 CCP is based and their Influence on the Scope of the Provision

3.2.1. Prohibition on Compulsion

Section 29 CCP is was introduced in 1926, owing to the need for protection against improper interrogation methods.[35] Section 29 CCP guarantees, not just in a general sense, that the authorities will act appropriate toward the suspect. The fact that a statement was made freely also enhances the reliability of the establishment of the truth. Initially, the suspect's right to remain silent – the phrase 'the suspect is not required to answer' – was not included in the text of Section 29 CCP. The point was that the suspect could make a statement freely, not that he

33 HR 11 October 2005, *Dutch Law Reports* 2006, 625.
34 See among others Groenhuijsen & Knigge 2001, p. 33. See also Prakken & Spronken 2001, p. 57-63.
35 Stevens 2005, Chapter 4.

should not make any statement at all. The right to remain silent ultimately ended up in the text of the provision, not because the legislature held that suspects were indeed allowed to keep their mouth shut, but because not having to answer was viewed as the strongest guarantee for not having to make a statement under duress.[36] That the accent in later years remained on the viewpoint of preventing duress is evident from the fact that the obligation to read a person his rights was dropped for almost 40 years (between 1935 and 1974). Informing the suspect of a right to remain silent was, as was reasoned at the time, confusing, and above all inefficient.[37]

3.2.2. The nemo tenetur Principle and the Autonomy of the Accused in the Trial

Although the regulation of government actions had traditionally been dominant, in the course of time, the point of view of the accused's position in the trial has become more strongly visible. This was initially inspired by the English accusatorial system. Later, particularly as of 1993 when the European Court of Human Rights (ECHR) recognized the right to remain silent and the privilege against self-incrimination in its case law as essential elements of a fair trial, Section 29 CCP was interpreted more and more on the basis of the idea that the accused takes an autonomous position in a fair trial, as guaranteed by Article 6 of the European Convention on Human Rights (ECHR). The accused is not (merely) an object of investigation, but has the freedom to determine his position and defend himself from that position. The accused has no role in the trial under public law; he does not have to account for his attitude to the other participants in the trial. The expression and realization of that position is found particularly in Section 29 CCP.[38] The accused has the freedom to state what he wants and even the freedom to make no statement at all. The accused should also be aware of that position. Reintroduction of the reading of rights in 1974 was therefore typical of the development in the ideas on Section 29 CCP outlined here.

The autonomy of the accused under Section 29 CCP is sometimes expressed by saying that the accused cannot be compelled to incriminate oneself,[39] or indicated by the Latin adage *nemo tenetur prodere se ipsum*. As already noted, Section 29 CCP is not based only on the prohibition of pressure but also on the *nemo tenetur* principle.

The accused's freedom to determine his attitude toward the trial is not unlimited. The right to remain silent, for example, does not extend to giving answers to questions about personal details, although such information can indeed be incriminating for the accused under certain circumstances.[40] Nor does the right to remain silent apply to a reply card that the driver of an illegally parked car has to fill out.[41] Interrogating an accused by way of a so-called jail plant – an undercover investigating officer in the jail – is allowed as well. Whether

36 *Parliamentary Papers II* 1913/14, 286, No. 3, p. 71. Cf. also the Explanatory Memorandum to the Draft-*Staatscommissie* (Government Committee) 1913, p. 67-70; Lindenberg 2002, p. 436-437.

37 *Parliamentary Papers II* 1935/36, 309, No. 3, p. 1-2.

38 This development is described by Stevens 2005, Chapter 4, especially p. 51-53.

39 Cf. also HR 16 January 1928, *Dutch Law Reports* 1928, 233.

40 See among many others HR 18 September 1989, *Dutch Law Reports* 1990, 531, annotated by Van Veen. Asking for a telephone number can under certain circumstances come under the protection of Section 29 CCP, and in that case must be preceded by reading the suspect his rights. This does not apply, however, if the suspect has already given permission to investigate his telephone traffic. See HR 3 April 2007, *Dutch Law Reports* 2007, 209.

41 HR 1 October 1985, *Dutch Law Reports* 1986, 405 and 406.

or not the right to remain silent is violated in that situation depends on the pressure exerted and the attitude taken by the accused to the trial up to the time in the criminal case.[42]

In the court decision-making stage, the accused's position is assessed in the context of the incriminating evidence available. A statement made by the accused may be considered 'false' by the judge and as such become part of the evidence against the accused.[43] The judge can also, for example, reject a defense, arguing that the accused does not want to make statements on further questions regarding that defense.[44] Remaining silent, however, cannot as such contribute to the evidence.

3.3. Exclusion of Statements from Evidence due to Violation of the Right to Remain silent and related Rights and Principles

3.3.1. Reading a Suspect his Rights

Pursuant to subsection 2 of Section 29 CCP, a suspect must be informed of the fact that he is not required to answer. Neither in Section 29 CCP nor elsewhere in the law are sanctions imposed on failure to observe the rule on reading suspects their rights. In the mostly somewhat older case law, it is nevertheless recognized that failure to read a suspect his rights can result in exclusion of evidence. The point of departure in these judgments is that Section 29 CCP (2) is for the purpose of protecting the suspect against compelled self-incrimination and that, if he was not read his rights during the investigation preliminary to prosecution or at the hearing, the statement may not as a rule be used as evidence unless the suspect's interests or defense is not harmed.[45] The subjective approach and relativity requirement of Section 359a CCP can be recognized in this.

Starting from autonomy in the trial as a background of the right to remain silent, accused persons must have had a real possibility to choose their attitude towards the trial as they saw fit.[46] Whether an accused's defense has been harmed depends for example on the way in which and the circumstances under which the accused's statement was obtained. If the accused's lawyer was present during the interrogation, the judge will not easily assume that the accused was harmed by the lack of notification. The same holds if the accused knows or is expected to know that he is not required to answer. This can be the case, for example if in a series of interrogations, rights were not read to the accused in the second or third interrogation, but were in the first interrogation.[47] Whether the accused's defense is harmed, however, depends particularly on the attitude toward the trial the accused takes in court. If the accused makes a different statement in court than in the preliminary investigation, his interests may have been infringed. If the accused says that he has no objection to not having his rights read to him, or he is assisted in court by a lawyer and does not rely on such omission in that situation, his interests will not have been harmed. Even if the accused makes the same statement in court as in the preliminary investigation after having been read his rights, or if the accused confesses again in a second lawful interrogation during the

42 HR 29 March 2004, *Dutch Law Reports* 2004, 263. In this case, the Supreme Court relies on European case law. See ECHR 5 November 2002, *Dutch Law Reports* 2004, 262 (*Allan*), annotated by Schalken. Even though the ECHR seems to dislike sneaky undercover practices somewhat more than the Supreme Court.

43 See e.g. HR 12 November 1974, *Dutch Law Reports* 1975, 41, annotated by Van Veen.

44 HR 19 March 1996, *Dutch Law Reports* 1996, 540, annotated by Schalken.

45 See for example HR 17 January 1978, *Dutch Law Reports* 1978, 341 and HR 26 January 1982, *Dutch Law Reports* 1982, 353.

46 Stevens 2005, p. 57.

47 For an overview of this case law, see Lensing 1988, p. 205-207. See also Jörg 2005, Note 16 to Section 29. Cf. also HR 14 June 2005, *LJN* AS8854.

preliminary investigation, he is deemed to have had a real freedom of choice. The reservation can be made to all this that it is sometimes difficult to determine how real the accused's freedom of choice actually was. Once the accused has made a detailed statement during the interrogation, it will presumably not be easy for him to keep his mouth shut at the next interrogation.[48]

The case in which, after a statement was obtained unlawfully, the suspect still makes a statement under lawful circumstances was 'resolved' in older case law by way of relativity. Regarding the statements made later, it may be more accurate to speak of broken causality. The reading of rights in the second instance prevents the lawfully obtained statement from being viewed as fruit of the earlier omission of the reading of rights.[49]

3.3.2. Improper Compulsion and Improper Methods during the Interrogation in the Investigation Stage

3.3.2.1. What is Improper Compulsion?

Besides a right to remain silent for the suspect, Section 29 CCP contains an instruction for the interrogating officials: they may not use any unacceptable pressure or duress during the interrogation. This instruction rule is the necessary counterpart of the right to remain silent,[50] and is intended also to guarantee the appropriateness of government actions. The boundary between appropriate and inappropriate is difficult to determine. The difficulty in applying Section 359a CCP is first of all to determine the unlawfulness itself.

There is no debate in this context over the unlawfulness of physical abuse.[51] Such compulsion is not allowed either under any circumstances on the basis of Article 3 ECHR, the ban on torture and the ban on inhuman and degrading treatment. But duress can also be psychological. Exerting a certain degree of psychological pressure is allowed and is considered necessary to get a suspect to talk.[52] There are no problems, for instance, in confronting a suspect with incriminating evidence. His attention may also be drawn to contradictions in his own story and the weakness of his position. It is allowed as well to tell a suspect that he can go home if he cooperates and stops remaining silent. Case law, however, stipulates that various interrogation methods must be considered unlawful. These methods are usually categorized as 'threat and intimidation', such as making shooting movements next to the suspect's head, suggesting that the police could see to it that the suspect gets sentenced to twenty years imprisonment and that it was possible to have the suspect's face match the composite drawing in the file, as well as suggesting that the suspect's lawyer did not serve the suspect's interests but those of the criminal organization.[53] The most well known unlawful method is the so-called Zaandam interrogation method. With this method, with the aid of a communications expert in the interrogation room, the suspect was interrogated very

48 Jörg 2005, Note 16 to Section 29.

49 HR 25 March 1980, *Dutch Law Reports* 1980, 437 and HR 26 January 1988, *Dutch Law Reports* 1988, 818. In this case, the judge did not use previous statements taken without rights being read, so the Supreme Court only had to deliberate on the question of the use of later statements that were lawful in themselves. Cf. also Embregts 2003, p. 148.

50 See Jörg 2005, Note 9 to Section 29.

51 Cf. on the historic background of Section 29 CCP, Stevens 2005, p. 40-46.

52 See Lensing 1988, p. 39 *et seq.* and Jörg 2005, Note 9 to Section 29.

53 For a detailed overview of the case law, see Jörg 2005, Note 10 to Section 29. See also Gerritsen 2000, p. 228-238.

intensively, for a long time and suggestively and surrounded by photos of both his family and the victim.[54]

3.3.2.2. Exclusion of Statements obtained under Improper Compulsion

Once the unlawfulness of the interrogation method is established, a decision must be made on the consequences to be attached on the basis of Section 359a CCP and what the Supreme Court ruled on this in the standard judgment from 2004. If exclusion of evidence is to be considered, the unlawful interrogation method must constitute a considerable breach of Section 29 CCP (so actions must have been taken that were unacceptable beyond any doubt), the suspect himself must have made an incriminating statement by which he harmed his own position in the trial (relativity requirement), and that statement, as well as the fruits thereof, must have resulted exclusively from the improper interrogation (causality requirement).

Exclusion of evidence due to an unlawful manner of interrogation does not readily occur in judicial practice. It is also important in that context that evidentiary exclusion defenses must meet rather stringent requirements if the judge is to hear them. The defense counsel cannot suffice with general reliance on Section 29 CCP. He must also state specifically what the unlawfulness comprises and what consequence should be attached to this and why.[55] Even if a defense meets these requirements, exclusion of evidence will not readily take place. In some cases, exclusion of evidence is not considered because there is simply nothing to exclude. This can be the case because the suspect did not make a statement in spite of the pressure exerted on him,[56] the lower court did not include the questionable statements in its ruling on the evidence based on its freedom to select evidence and managed to obtain a conviction in a different way,[57] or because only those (two) statements by the suspect were used that he made before the police started using unacceptable methods.[58] The debate is thus limited to the question whether the Public Prosecution Service should be barred from prosecuting, which occurs only very rarely, or if the sanction of sentence reduction is an option.

In cases where exclusion of evidence is possible in principle, because the statement allegedly obtained under duress was indeed used as evidence, there may still be reasons within the assessment framework of Section 359a CCP not to exclude that evidence. In a case from 2002, for instance, the Supreme Court held that occasional unlawful actions can be compensated by the total of largely calm interrogations (this concerns the review of 'the gravity of the breach' pursuant to Section 359a(2) CCP). The same multiplicity of interrogations and statements also seems to result in the Supreme Court's opinion that causality had been broken: the statements used as evidence were not made as a *direct* result of the unlawful actions and therefore did not necessarily lead to exclusion of evidence, according to the Supreme Court.[59]

54 HR 13 May 1997, *Dutch Law Reports* 1998, 152. The complaint to the ECHR that the method was in conflict with Art. 3 ECHR due to inhuman and degrading treatment was disallowed by the European Court of Human Rights. ECHR 14 March 2000, Appl. No. 47240/99 (*Ebbinge v. the Netherlands*).

55 HR 10 June 1980, *Dutch Law Reports* 1980, 591; HR 21 February 1989, *Dutch Law Reports* 1989, 668 and HR 4 November 2008, *Dutch Law Reports* 2008, 581.

56 HR 22 September 1998, *Dutch Law Reports* 1998, 104.

57 HR 13 May 1997, *Dutch Law Reports* 1998, 152. The central issue was whether the methods were so unlawful that the Public Prosecution Service should have been barred from prosecuting. According to the Supreme Court, that was not the case.

58 HR 9 May 2000, *Dutch Law Reports* 2000, 521.

59 HR 12 March 2002, *LJN* AD8906. An interesting question is the extent to which an accused is still free to choose his position and remain silent during lawful interrogations once he has confessed as a result of →

All in all, evidentiary exclusion defenses against unlawful interrogation methods do not easily achieve results. In our view, this is connected with the fact that the unlawful interrogation methods have remained relatively innocent to date. Difficult issues regarding torture have simply not occurred yet in the Netherlands. Moreover, the consequences of the unlawful actions for the accused are usually limited because most judges are able to circumvent the contaminated statements. The case law of the lower courts does, however, show that there has been more willingness in recent years to attach consequences to unreliable interrogation methods.[60] Although strictly speaking, judges should not have to apply the rules of Section 359a CCP in such a case, in practice, reliability seems to be disposed of rather often within the unlawfulness issue.

An interesting question is the extent to which all qualifications in Section 359a CCP would apply if it were determined that the suspect had been tortured. It seems obvious that this is an important principle of procedural law that protects the suspect and has been breached to a considerable extent. After all, this follows not only from the prohibition of pressure but also from the absolute prohibition of torture under Article 3 ECHR that applies in the Netherlands. According to the ECHR, the use of statements obtained by torture as evidence comes down to a violation of the right to a fair trial under Article 6 ECHR, regardless of the circumstances of the case. On the basis of that case law, fruits of such statements could not be used in the Netherlands, either. The strict causality requirement does not apply in this case.[61] Where not torture, but inhuman and degrading treatment is concerned,[62] the ECHR nevertheless allows for a weighing of interests.[63] Since it is very difficult to determine where the boundary lies between inhuman treatment and torture – and especially since the Court took account of the pressure on the interrogating officials due to the urgency of the situation in its ruling[64] – the obligation to exclude evidence formulated by the ECHR ultimately seems more or less qualified.[65]

3.3.3. Right to Consult with an Attorney and to have an Attorney present during Police Interrogation

3.3.3.1. Recent Developments

The debate over the question whether suspects are entitled to be assisted by a lawyer during the first police interrogation has been going on in the Netherlands for about forty years. Since 2007, developments have been in progress that compel a detailed discussion of this subject.

unlawful methods. See in that connection the judgment of the ECHR of June 30, 2008, Appl. No. 22978/05 (*Gäfgen v. Germany*) (legal ground 108).

60 See Dubelaar 2009, p. 93. A good example of such a judgment is the judgment of the Breda District Court of 2 March 2009, *LJN* BH4358. Cf. also Duker & Stevens 2009.

61 ECHR 11 July 2006, Appl. No. 54810/00, *Dutch Law Reports* 2007, 226 (*Jalloh v. Germany*), legal ground 40, 50 en 51 and ECHR 30 June 2008, Appl. No. 22978/05, *Dutch Law Reports* 2009, 20 (*Gäfgen v. Germany*), legal ground 99.

62 Art. 3 ECHR prohibits both torture and inhuman and degrading treatment.

63 Cf. ECHR 30 June 2008, Appl. No. 22978/05, *Dutch Law Reports* 2009, 20 (*Gäfgen v. Germany*).

64 Cf. ECHR 30 June 2008, Appl. No. 22978/05, *Dutch Law Reports* 2009, 20, (*Gäfgen v. Germany*), legal ground 69.

65 The question whether the *Schutznorm* applies in cases of torture has not yet been brought up in European case law, nor, in general, has it been answered by the Court of Justice. Van Kempen is critical of this. See the annotation by Van Kempen 2007, p. 367.

The Code of Criminal Procedure has several provisions pertaining to the suspect's right to free access to a lawyer.[66] It is also provided that the suspect has a right to be visited by a duty attorney during detention.[67] The Supreme Court, however, does not interpret these rights so broadly that they entail a right to assistance by a lawyer during a police interrogation, or that the suspect has a right to consultation prior to that interrogation.[68]

This restrictive interpretation can be placed in the Dutch tradition to place the accent in criminal proceedings on the interest of establishing the truth and the central role the suspect's statement obtained during the police interrogation plays in this. A lawyer who advises his client to remain silent thwarts that interest in a certain sense. Furthermore, as stated, the interrogation can be regulated by audiovisual recording of interrogations. Proponents of the right to a lawyer during the interrogation assert on the other hand that in this way, the autonomous position of the accused to which he should be entitled under Section 29 CCP is not sufficiently recognized. The right to remain silent and the freedom to make statements are effective rights only if the accused has been fully informed of the consequences of talking and remaining silent. Only then does the accused have a real option to choose his attitude toward the trial.[69]

As a result of several interesting recent developments, a change will soon be made in the situation described above. An initial development came in the wake of the so-called Schiedam Park murder case. In this case, a man was convicted, wrongly, as appeared later, partly on the basis of his own false confession. As part of a set of measures intended to prevent such miscarriages of justice in the future, the Minister of Justice started an experiment called 'Lawyer during Interrogation' ('*raadsman bij verhoor*'). For a period of two years, in two regions, lawyers will be admitted to the first police interrogation in murder and manslaughter cases under strict conditions.[70] Based on the results of the research on that experiment, the Minister will decide if and to what extent there will be a future right for lawyers to attend certain interrogations.[71] A second development is the debate over the consequences that should be attached to the judgments of the ECHR in the Salduz and Panovits cases. In these cases dating from 2008, the ECHR held that 'access to a lawyer should be provided as from the first interrogation of a suspect by the police (…)'.[72] The meaning of these words is not immediately clear. The bar in particular states that the judgments should be interpreted to mean that lawyers have a right to be present during police interrogations, which would be a reversal of the existing case law of the ECHR in which this right is not explicitly recognized.[73] The Dutch Minister of Justice and Supreme Court, however, do not want to go

66 See Sections 28(2) and 50(1) CCP.

67 See Section 40(2) CCP.

68 See in detail Spronken 2001, p. 112-114 and p. 223-235. See e.g. the conclusion of deputy A-G Bleichrodt for HR 13 November 2007, *Dutch Law Reports* 2008, 116.

69 About this debate, also for literature references, see, Stevens 2005, p. 62-64.

70 For instance, the lawyer must sit a small distance behind his client. The lawyer may not have eye contact with his client, may not say anything and will be removed from the interrogation room as soon as he interrupts the interrogation after being warned not to do so. See the protocol of the experiment on <http://www.advocatenorde.nl/newsarchive/Protocol_ Raadsman_politieverhoor.def.pdf>.

71 See the Letter from the Minister of Justice, *Parliamentary Papers II* 2006/07, 30 800, VI, No. 86, Section 4.

72 ECHR (Grand Chamber) 27 November 2008, Appl. No. 36391/02, *Dutch Law Reports* 2009, 214 (*Salduz v. Turkey*), and ECHR 11 December 2008, Appl. No. 4268/04, *Dutch Law Reports* 2009, 215 (*Panovits v. Cyprus*).

73 See for example Spronken 2009, p. 94-100. See also Braanker 2009, p. 276-282. See also for a less far-reaching interpretation, also followed by the Minister and Supreme Court: Borgers 2009, p. 88-93.

that far. Both the Supreme Court and the Minister of Justice recognize the right of a suspect to consult with a lawyer before the interrogation by the police, as well as the obligation of the police to point this out to the suspect.[74] Regarding underage suspects, the Supreme Court does recognize a right to be assisted during an interrogation, but such assistance can be provided by a lawyer as well as a trusted representative.[75]

3.3.3.2. Exclusion of Evidence

A suspect has a right to assistance from his lawyer from the time he is taken into custody. According to the case law in the pre-Salduz situation, that right does not entail that the lawyer may be present during the first interrogation by the police or that a suspect must have spoken to his lawyer before the first interrogation. Totally in line with this starting point is the case law showing that reliance by a suspect on the evidentiary exclusion rule of Section 359a CCP, because he was not visited by a duty lawyer during his police custody is not easily honored. Even a suspect who initially makes incriminating statements and remains silent after the (late) visit by his lawyer cannot expect to benefit very much from Section 359a CCP because of the relativity requirement. Simply because, as long as he has been read his rights and other guarantees relating to the interrogation have been fulfilled, his interests will not have been harmed. The right to a lawyer during police custody does not, after all, protect the interest that the suspect can speak to his lawyer prior to the interrogation.[76]

Things have changed since the Salduz judgment and its interpretation by the Dutch Supreme Court. In its judgment of June 30, 2009, the Supreme Court not only recognized the right to consultation, but also held that if this right is violated, *as a rule*, the statement obtained during the police interrogation will be excluded from the evidence – except for situations in which the suspect voluntarily waived his right to consultation and there are urgent reasons in a specific case to restrict the right.[77] In reasoning this way, the Supreme Court almost literally embraces the words of the ECHR in Salduz and Panovits and holds in addition in the terminology of the standard judgment that it must be assumed that if the right to consultation is not honored, an important rule or legal principle of criminal procedure has been breached to a considerable extent.[78] That right to consultation protects the suspect's interest in freedom to make his statement, thus the relativity requirement, unlike the situation existing before the Salduz judgment, is no longer at issue. The requirement of direct causality still applies fully nevertheless. According to the Supreme Court, exclusion of evidence is not considered in principle in respect of statements made by a suspect after he was able to consult a lawyer and his rights were read to him.[79]

74 See the letter from the Minister of April 15, 2009 on the presence of a lawyer during police interrogation, Sections 4.3 and 5 (*Parliamentary Papers II* 2008/09, 31700 VI, No. 117) and HR 30 June 2009, *Dutch Law Reports* 2009, 349, 350, and 351, with note by Schalken.

75 See e.g. HR 30 June 2009, *LJN* BH3081, legal ground 2.6.

76 Cf. HR 13 November 2007, *Dutch Law Reports* 2008, 116, in particular the note by Borgers. See also HR 29 May 1990, *Dutch Law Reports* 1990, 754 and HR 13 May 2006, *Dutch Law Reports* 2006, 369, in which the statement already did not qualify for exclusion because it was not plausible that the lack of legal assistance by a duty attorney had influence on the contents of the statements made by the suspect. The suspect persisted in his confession; in short, there was no causal connection.

77 HR 30 June 2009, *Dutch Law Reports* 2009, 349, 350, and 351, legal ground 2.7.2.

78 The ECHR also mentioned exclusion of evidence 'as a rule'. See ECHR (Grand Chamber) 27 November 2008, Appl. No. 36391/02, *Dutch Law Reports* 2009, 214 (*Salduz v. Turkey*), legal ground 55.

79 HR 30 June 2009, *Dutch Law Reports* 2009, 349, 350, and 351, legal ground 2.7.3.

3.4. Exclusion of a Lawfully Obtained Statement after an Unlawful Investigative Act?

In principle, unlawful detention does not prevent the use of a statement obtained in that situation according to the rules. In that case, there is a temporal and not a causal connection ('afterwards but not because').[80] Exclusion of evidence enters the picture as an option (naturally with all the corresponding preconditions already explained above) only if the defense can demonstrate that, for example, unacceptable pressure was also exerted during the unlawful detention or the suspect was not read his rights. Also if an unlawful search has taken place, the suspect is arrested and subsequently interrogated can the lawful statement be used as evidence without any problems because of the lack of a causal connection with the unlawful search. The situation is somewhat different if the suspect is confronted during a lawful interrogation with results of an unlawful search and then confesses. If it is plausible that the statement is only the result of the unlawful confrontation, it should be excluded from the evidence.[81] That this does not readily occur is evident from a Supreme Court judgment in which the suspect was confronted during the interrogation with DNA material found at the crime scene that proved to come from him. This material should, however, never have been linked to the suspect because the match was made on the basis of material from the suspect that should already have been removed from the DNA database. The Supreme Court ruled that the confession may well have been made after a suggestion that DNA material from the suspect was available, but it was made before the suspect was confronted with the actual DNA hit. Exclusion of evidence was not considered for that reason.[82]

4. Conclusions

It is evident from the description of Section 359a CCP and its elaboration in the case law of the Supreme Court that illegally gathered evidence and other sanctions set on illegally gathered evidence are dealt with in a balanced manner in the Netherlands. As is also evident from the description of the way in which violations of privacy and the right to voluntary statement/right to silence is assessed, there are numerous criteria and viewpoints that the judge must take into consideration in assessing breaches of procedural rules and choosing the appropriate sanctions on them. Because of that balance, the system of Section 359a CCP is not always easy to fathom. The interrelationship among the sanctions is not easy to denote, either. It can nevertheless be said that a bar to prosecution by the Public Prosecution Service is pronounced only in exceptional cases, and Dutch courts also tend to be relatively restrained in excluding evidence. Breaches of procedural rules are disposed of fairly regularly by sentence reduction or by merely establishing unlawfulness.

Criticism is expressed in the Dutch literature, particularly of the restrained manner of dealing with the exclusion of evidence. In many cases, this criticism is inspired from a constitutional viewpoint.[83] In this context, the binding of the government by law is first and foremost. Important arguments for excluding evidence are that the government must demonstrate that it obeys the rules itself (the demonstration argument), that the government may not benefit from illegally gathered evidence (the reparations argument) and that future

80 See for example HR 26 January 1988, *Dutch Law Reports* 1988, 818.

81 See HR 22 October 1991, *Dutch Law Reports* 1992, 218, legal ground 6.2, in which the Supreme Court used a broader causality requirement ('largely'). This is deemed to be restricted by the standard judgment from 2004.

82 HR 27 January 2009, *Dutch Law Reports* 2009, 86 (retrial).

83 See e.g. Embregts 2003 and Van Woensel 2004.

breaches of procedural rules should be prevented (the prevention argument).[84] If one chooses this approach, it is not very logical, for example, to place a lot of emphasis on the relativity requirement. Whether or not the suspect's interests have been harmed is not particularly relevant if the focus is on the government's behavior.

There are other approaches over and against this constitutional point of view.[85] One can, for instance, reason on the basis of the suspect's subjective rights. In that case, a response to unlawful government actions is appropriate only if those rights have been impaired. In this approach, there is every reason to apply the relativity requirement. There are other arguments as well for exercising restraint in excluding illegally gathered evidence. In this context, it is especially important to strive to establish the substantive truth. Moreover, the exclusion of evidence can result in social unrest, certainly if it leads to acquittal. The impression is quickly aroused that an accused is benefitting from exclusion of evidence, while the victim of the crime in question is left out in the cold.

Section 359a CCP and the related case law of the Supreme Court are not based on a fundamental choice of one approach or another. The case law of the Supreme Court tends to take a course in which the constitutional viewpoint outlined above, which focuses on the appropriateness of Government actions in a general sense, is pushed to the background and in which imposing sanctions on breaches of procedural rules concentrates on the specific interest of an individual suspect in a fair trial.[86] But not just that specific interest is considered, as witnessed by the fact that the Supreme Court leaves a certain margin not to set the relativity requirement in certain cases. It also holds that the Supreme Court's approach recognizes the importance of establishing the substantive truth and the (perceived) social need for satisfaction, without these viewpoints being automatically of decisive importance. To this extent, unification doctrine is involved, in which the various arguments and viewpoints all play a part, and in which a moderate response to breaches of procedural rules is chosen. The balanced, but not always easy to fathom system of rules on imposing sanctions on breaches of procedural rules is the result of this.

84 One can, for that matter, put forth the same arguments to a certain extent for sentence reduction as a sanction, albeit that the response that then follows is less radical for the government.

85 See e.g. Corstens 2008, p. 705-707; Kuijper 2009.

86 Cf. Kuiper 2009, p. 52-53.

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